ATTORNEY FOR APPELLANT:

LAWRENCE D. NEWMAN
Newman & Newman
Noblesville, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

CHRISTOPHER A. AMERICANOS
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

WALTER BLAKE, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A04-0705-CR-254
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT NO. 3
The Honorable William J. Hughes, Judge
Cause No. 29D03-0509-FC-399

August 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Following a jury trial, Appellant-Defendant, Walter Blake, Jr., appeals following his conviction and sentence for Stalking as a Class C felony,[1] two counts of Intimidation as Class A misdemeanors,[2] and two counts of Invasion of Privacy as Class A misdemeanors.[3] Upon appeal, Blake claims the trial court abused its discretion in permitting the State to amend the charging information and in denying his motion to exclude a witness, and further, that this constituted fundamental error. Blake additionally challenges the appropriateness of his sentence. We affirm.

FACTS

The record reveals that Blake was involved in a relationship with his neighbor, Victoria Marks, beginning in 2003. By August of 2005, Marks was a protected party under two protective orders against Blake, one from Marion County and the other from Hendricks County. According to Marks, on August 9, 2005, she told Blake to leave her property. Later that day, Blake came to the American Mattress Store in Noblesville where Marks worked and grabbed her. On August 13, 2005, Blake telephoned Marks approximately fifteen times. According to Marks, Blake threatened to harm both her and her property and to cause her to lose her job. Noblesville Police Officer Shannon Trump testified that she arrived at the scene, observed several calls come to Marks's phone, heard a male voice on the other end, and heard Marks address the caller as Blake. That night, Marks retrieved her pet from her home and stayed at a hotel, fearing for their safety. The next day, August 14, Marks found that she had received approximately

[1] Ind. Code § 35-45-10-5(b)(3) (2005).
[2] Ind. Code § 35-45-2-1(a)(1) (2005).
[3] Ind. Code § 35-46-1-15.1(1) (2005).

fourteen to sixteen messages on August 13-14, all from Blake. According to Marks, the messages were in angry tones, with Blake telling Marks not to call the police and that she had better return home, threatening her dog, and indicating that he knew where Marks's friends lived. Due to her fear, Marks did not return home that night either.

Noblesville Police Department Officer Joshua Blocher testified that he was dispatched to the American Mattress Store on August 14, 2005. According to Officer Blocher, Marks received nine phone calls, approximately eight of which Officer Blocher answered. On more than one call, Blake identified himself and requested to speak with Marks. Officer Blocher informed Blake that Marks did not want to talk to him.

On September 30, 2005, the State charged Blake with stalking as a Class D felony (Count 1), two counts of invasion of privacy as Class A misdemeanors (Counts 2 and 4), and two counts of intimidation as Class A misdemeanors (Counts 3 and 5). At Blake's January 18, 2006 initial hearing, the trial court set the omnibus date for March 21, 2006. On November 3, 2006, the State filed a Motion to Amend and Reception Cause, seeking to amend the stalking charge in Count 1 to a Class C felony based upon language in the charging information alleging violation of a no-contact order, and the State further sought to amend the invasion-of-privacy charges in Counts 2 and 4 to Class D felonies. The trial court granted the State's motion to amend and reception the cause.[4] On December 5, 2006, the day of trial, the State filed a new charging information reflecting these

[4] The cause number as originally charged was 29D03-0509-FD-399. As amended the cause number is 29D03-0509-FC-399. (App. 52)

amendments and including changed language in Count 1.[5] The information changed the language in Count 1 to specify "on or about August 9 and through August 14, 2005" rather than "on or about August 9, 2005 and August 14, 2005" as it had originally read. App. at 61, 9 (emphasis supplied). Defense counsel objected to this change on double jeopardy grounds,[6] and the trial court allowed the State to amend the information in Count 1 to specify, "on or about August 13, 2005 and August 14, 2005." App. at 61 (emphasis supplied).

Following this amendment, the court stated to defense counsel, "Now how do you want to deal with that situation? You have two choices. Go to trial or move to continue. One or two, I don't care which it is, but we're getting off this argument and moving on." Tr. at 24. Defense counsel responded, "Okay, then the defense would go ahead and proceed to trial Your Honor." Tr. at 24.

Also prior to trial, defense counsel objected to the testimony of Officer Blocher on the grounds that he was first listed as a witness on the amended information the day of trial. Following defense counsel's objection, the trial court, in view of the fact that Officer Blocher's name was listed on the probable cause affidavit, ordered the State to provide defense counsel with all of its information regarding Officer Blocher and

[5] The information re-named the intimidation charges as Counts 2 and 3 and the invasion-of-privacy charges as Counts 4 and 5, and it added as Counts 6 and 7 the sentence enhancements sought for the invasion-of-privacy charges. (App. 64) During jury deliberations, the State moved to dismiss Counts 6 and 7, and Blake does not challenge these additional changes on appeal. (App. 6)

[6] Defense counsel argued that Blake was tried separately regarding the events on August 9 under Cause No. 29D03-0508-CM-315. (Tr. 5) The State conceded that Blake had been separately tried for events occurring on August 9 and 11 but apparently alleged August 9 through August 14 in Count 1 for purposes of discussing these events to establish Blake's state of mind for acts occurring on August 13 and 14. (Tr. 9-10)

reserved to defense counsel the right to re-object after reviewing the information. After the jury had been picked, the court gave counsel the opportunity to object again to the testimony of Officer Blocher given the fact that he was not disclosed as a witness prior to trial. Defense counsel made no such objection.

Following trial and the jury's finding of guilt, the trial court entered judgment of conviction against Blake for stalking as a Class C felony and two counts of intimidation and two counts of invasion of privacy, all as Class A misdemeanors. Following a January 5, 2007 sentencing hearing, the trial court sentenced Blake to an aggregate eight-year sentence in the Department of Correction. Blake now appeals.

DISCUSSION AND DECISION

1. Amended Information

Upon appeal, Blake first claims that the trial court abused its discretion in permitting the State to amend the charging information on the day of trial. In making this claim, Blake points to *Fajardo v. State*, 859 N.E.2d 1201 (Ind. 2007). In *Fajardo*, the Supreme Court discussed the amendment of charging instruments pursuant to Indiana Code section 35-34-1-5 (2005)[7] and held that changes in matters of substance may not be made to the charging information if they occur fewer than thirty days before the omnibus date. 859 N.E.2d at 1207. Blake claims the amendment in this case was one of substance because his double jeopardy defense, which he claims was available to him under the original information alleging the stalking offense occurred "on or about August 9, 2005

[7] Effective May 8, 2007, the General Assembly amended Indiana Code § 35-34-1-5 to permit amendments in matters of substance at any time prior to trial so long as the changes do not affect the defendant's substantial rights. *See* Acts 2007, P.L. No. 178.

and August 14, 2005," was no longer available to him under the amended information alleging the stalking offense occurred "on or about August 13, 2005 and August 14, 2005." App.at 9, 61. The State concedes that Blake was convicted in a separate trial of crimes for his activities on August 9, 2006. The State responds, however, that the amendment at issue was one of form, not substance, and that pursuant to Indiana Code § 35-34-1-5(c) the amendment was therefore permissible because Blake's ultimate convictions did not violate double jeopardy.

We find it unnecessary to address this issue on its merits, however, because Blake has failed to preserve this issue for our review. It is well-settled that a defendant must request a continuance in addition to making an objection to a trial court's grant of a motion to amend. *Wright v. State*, 690 N.E.2d 1098, 1104 (Ind. 1997). Absent a motion to continue, the issue is waived on appeal. *Id*.; *see Haak v. State*, 695 N.E.2d 944, 951 n.5 (Ind. 1998). Upon permitting the State to amend its information, the trial court indicated to defense counsel that he had two choices: "Go to trial or move to continue." Tr. at 24. Defense counsel responded that he would "proceed to trial." Tr. at 24. Accordingly, we deem this issue waived.

2. Motion to Exclude

Blake's second argument challenges the trial court's denial of his motion to exclude the testimony of witness Officer Blocher, whom Blake contends was not properly disclosed as a witness by the State. Generally, the admission or exclusion of evidence is a determination entrusted to the discretion of the trial court. *Carpenter v. State*, 786 N.E.2d 696, 702 (Ind. 2003). We will reverse a trial court's decision only for

an abuse of discretion, that is, when the trial court's decision is clearly erroneous and against the logic and effect of the facts and circumstances before the court. *Id*. at 702-03. "Exclusion of evidence as a remedy for a discovery violation is only proper where there is a showing that the State's actions were deliberate or otherwise reprehensible, and this conduct prevented the defendant from receiving a fair trial." *Warren v. State*, 725 N.E.2d 828, 832 (Ind. 2000). In the context of discovery violations, a continuance is the usual remedy; "[e]xclusion of the evidence is an extreme remedy and is to be used only if the State's actions were deliberate and the conduct prevented a fair trial." *Berry v. State*, 715 N.E.2d 864, 866 (Ind. 1999). "Failure to request a continuance, where a continuance may be an appropriate remedy, constitutes a waiver of any alleged error pertaining to noncompliance with the trial court's discovery order." *Fleming v. State*, 833 N.E.2d 84, 91 (Ind. Ct. App. 2005) (citing *Warren*, 725 N.E.2d at 832).

Here, after the trial court gave defense counsel an opportunity to review the State's information regarding Officer Blocher, it asked defense counsel if he was prepared to move forward. Defense counsel indicated that he was. Because defense counsel did not ask for a continuance, we conclude he has waived any challenge on appeal to the admission into evidence of Officer Blocher's testimony.

Waiver notwithstanding, we find no abuse of discretion by the trial court in admitting this evidence. Several factors are considered helpful in determining whether to exclude witness testimony: (1) the point in time when the parties first knew of the witness; (2) the importance of the witness's testimony; (3) the prejudice resulting to the opposing party; (4) the appropriateness of instead granting a continuance or some other

remedy; and (5) whether the opposing party would be unduly surprised and prejudiced by the inclusion of the witness's testimony. *Rohr v. State*, 866 N.E.2d 242, 245 (Ind. 2007). Although defense counsel first officially knew that Officer Blocher was a witness the day of trial, Officer Blocher was listed in another officer's probable cause affidavit dated August 23, 2005, as having listened to some of the phone calls, so defense counsel would not have been unduly surprised by his testimony. Additionally Officer Blocher's testimony was important to the State's case, as Marks did not furnish detailed information regarding the calls on August 14th. Further, when questioned by the trial court after reviewing Officer Blocher's information, defense counsel made no objection or indicate any kind of prejudice, leading us to conclude that little was suffered. Further still, and as stated above, defense counsel made no motion for a continuance or alternative remedy. Upon reviewing these factors and with due deference to the trial court's discretion with respect to matters regarding the admission of evidence, we decline Blake's claim of abuse of discretion on this point.

3. Fundamental Error

Blake additionally claims fundamental error due to the trial court's permitting the amendment to the charging information and its failure to exclude Officer Bloch's testimony. The doctrine of fundamental error is only available in egregious circumstances. *Absher v. State*, 866 N.E.2d 350, 355 (Ind. Ct. App. 2007). The mere fact that error occurred and that it was prejudicial will not satisfy the fundamental error rule. *Id*. Likewise, it is not enough, in order to invoke this doctrine, to urge that a constitutional right is implicated. *Id*. To qualify as fundamental error, "'an error must be

so prejudicial to the rights of the defendant as to make a fair trial impossible' and must 'constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process.'" *Id*. (quoting *Benson v. State*, 762 N.E.2d 748, 755 (Ind. 2002)).

We find no fundamental error. While Blake claims his right to a fair trial was substantially prejudiced by the day-of-trial amendment to the charging information and the late disclosure by the State of Blocher as a witness, Blake was given multiple opportunities to seek a continuance or otherwise delay the trial in order to prepare for it to his satisfaction. *See* I.C. § 35-34-1-5(d). Defense counsel's representations the day of trial, after the trial court had permitted the amendment, indicated he was prepared for trial, and nothing from the trial suggests otherwise. Blake makes no claim that the amended information prevented him from knowing the nature of the charges against him, and his declining a continuance demonstrates he suffered no unfair surprise. *See Absher*, 866 N.E.2d 355-56. Defense counsel further indicated his preparedness for trial with respect to witness Officer Blocher, and again, nothing from the trial indicated otherwise. Accordingly, we find no violation of basic principles or denial of fundamental due process in the court's permitting the amendment and denying Blake's motion to exclude Officer Blocher's testimony.

4. Sentencing

Blake's final challenge is to the appropriateness of his sentence. We may revise a sentence authorized by statute if it is inappropriate in light of the nature of the offense and the character of the offender. *Childress v. State*, 848 N.E.2d 1073, 1079-80 (Ind.

2006) (citing Ind. Appellate Rule 7(B)). While we have held that we do not use "great restraint[,]" we nevertheless exercise deference to a trial court's sentencing decision, both because Rule 7(B) requires that we give "due consideration" to that decision and because we recognize the unique perspective a trial court has when making sentencing decisions. *Stewart v. State*, 866 N.E.2d 858, 865-66, (Ind. Ct. App. 2007). A defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate. *Childress*, 848 N.E.2d at 1080.

Following the sentencing hearing, the trial court sentenced Blake to the maximum eight-year sentence on his conviction for stalking and to one-year sentences on each of his four additional Class A misdemeanor charges, with the sentences to be served concurrently. Blake claims that this maximum sentence is inappropriate in light of the fact that his offense involved "only" harassing telephone calls and messages and did not include in-person contact.

We do not believe that the failure of Blake to make his threats in person rather than over the telephone somehow lessens their impact. While the instant offenses may not have involved personal contact, Blake's history of victimizing Marks both physically and mentally demonstrates the serious threat of his behavior. In this case, Blake contacted Marks repeatedly in violation of protective orders, and he threatened her, her dog, and her friends to the point that Marks did not feel free to sleep in her own house. The sheer number of calls over a two-day period as well as their threatening content in light of Blake's and Marks's history does not weigh against the imposition of the maximum sentence.

Further, Blake's character, as reflected by his lengthy criminal history, similarly does not weigh against a maximum sentence. Along with two prior convictions for burglary, Blake has twice been convicted of invasion of privacy for acts occurring in 2004, as well as domestic battery and another conviction for invasion of privacy in 2005 for acts directed at Marks occurring four days prior to the instant offenses. The instant offenses were committed in violation of Marks's protective orders against Blake. As the trial court found, Blake's character in light of his past offenses and his continuing victimization of Marks and violation of her protective orders indicate his total disregard for the law. In light of the ongoing threatening nature of Blake's criminal acts, specifically to Marks's safety, we conclude his aggregate eight-year sentence was not inappropriate.

In sum, we conclude that Blake's challenges to the trial court's amendment of the charging information and its denial of his motion to exclude are waived, that he suffered no fundamental error, and that his eight-year aggregate sentence is not inappropriate in light of his character and the nature of his offenses.

The judgment of the trial court is affirmed.

NAJAM, J., and MATHIAS, J., concur.